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as BURLINGTON INSURANCE COMPANY)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JENNY WOLFES,
Plaintiff,
vs.
BURLINGTON INSURANCE
COMPANY AND DOES 1 to 25,
inclusive
Defendant,

) CASE NO. C07 04657 RMW

) **DEFENDANT THE BURLINGTON
INSURANCE COMPANY'S REPLY
TO JENNY WOLFES'
OPPOSITION TO BURLINGTON'S
MOTION TO DISMISS
COMPLAINT AS IMPROPERLY
DUPLICATIVE**

) Date: March 14, 2008
Time: 9:00 a.m.
Ctrm: 6

Defendant The Burlington Insurance Company (“Burlington”) hereby submits its Reply to Jenny Wolfes’ Opposition to Burlington’s Motion to Dismiss Complaint as Improperly Duplicative.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. DISMISSAL OF THIS ACTION IS PROPER.

Notably, in Plaintiff Jenny Wolfes' Opposition, there is no explanation as to why Plaintiff filed a second action against the same defendant that arises out of the same nucleus of facts. Moreover, Plaintiff does not contend that the two cases arise out of a different nucleus of facts or are somehow unrelated. In other words, it is undisputed that Plaintiff chose to file a second action against the same defendant for claims arising out of the same facts.

Irrespective of the motivation for filing the duplicative action, and for the reasons already set forth in Burlington's moving papers, it was improper for Wolfes to file the second action. Accordingly, Plaintiff's second action against Burlington should be dismissed.

**II. IF THE DUPLICATIVE COMPLAINT IS NOT DISMISSED,
PLAINTIFF'S CLAIMS FOR BAD FAITH AND INTENTIONAL
INFILCTION OF EMOTION DISTRESS SHOULD BE DISMISSED.¹**

In deciding a 12(b)(6) motion, although a court is to accept all material allegations in the complaint, as well as reasonable inference drawn from them, see, e.g., Beliveau v. Caras, 873 F. Supp. 1393, 1395-1396 (C.D. Cal. 1995), a court need not accept conclusory allegations, legal characterizations or unreasonable inferences of fact. Transphase Sys., Inc. v. So. Cal. Edison Co., 839 F. Supp. 711, 718 (C.D. Cal. 1993); Moody v. Liberty Life Assur. Co., 2007 U.S. Dist. LEXIS 32837 at *15 (N.D. Cal. 2007) (citing Transphase).

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¹ Note, Plaintiff already conceded in its opposition that its fourth claim for negligent infliction of emotional distress should be dismissed. [Plaintiff's Opposition, 7:8-11.] As such, that claim is not further discussed in this reply brief.

1 **A. Plaintiff's Claim for Breach of the Implied Covenant Alleges
2 Nothing More than a Refusal to Pay; The Allegations of
3 "Conspiracy" are Pure Conclusions.**

4 Plaintiff points to two paragraphs to establish that its bad faith claim is
5 sufficiently pled. [Plaintiff's Opposition, 5:14-6:10.] The first paragraph –
6 paragraph 23 – contains a conclusory allegation of some kind of conspiracy taking
7 place between Burlington and a plaintiff in the underlying action filed against Ms.
8 Wolfes. There is no question that the "conspiracy theory" set forth by Ms. Wolfes
9 fails to cite any supporting facts or any other conduct that would support this far-
10 fetched notion. Ms. Wolfes should not be permitted to rely on this baseless and
11 unsupported theory to assert a bad faith claim.

12 The only other paragraph Plaintiff mentions in its Opposition is paragraph 24.
13 In that paragraph, Plaintiff again sets forth a conclusory allegation that Burlington
14 "knew that a duty to defend was owed to Plaintiff, yet refused to provide a defense."
15 [Plaintiff's Opposition, 6:3-6.] Once again, there are zero facts set forth in
16 Plaintiff's Complaint to support this allegation. As such, the Court should not
17 accept this conclusory allegation as being sufficient to support a bad faith claim.
18 This conclusory allegation is asserted in all bad faith claims, except that the subject
19 Complaint does not have the accompanying facts to support such an allegation.

20 **B. Plaintiff's Unsupported Conspiracy Theory is Insufficient to
21 Sustain its IIED Claim.**

22 Similar to Plaintiff's bad faith claim, Plaintiff relies on the "conspiracy
23 theory" to support the notion that it sufficiently pled a claim for intentional infliction
24 of emotional distress. [Plaintiff's Opposition, 6:24-7:7.] For the same reason as
25 explained above, Plaintiff should not be permitted to rely on this unsubstantiated
26 claim to support its third cause of action for intentional infliction of emotional
27 distress. There are NO facts set forth that establish outrageous conduct on the part
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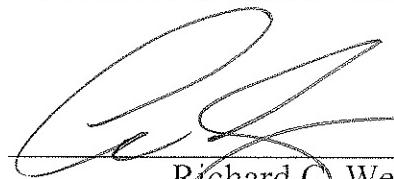
1 of Burlington. Accordingly, if the entire duplicative complaint is not dismissed,
2 Plaintiff's third cause of action for IIED should be dismissed.

3 **III. CONCLUSION.**

4 For the foregoing reasons, Defendant The Burlington Insurance Company
5 requests that its Motion to Dismiss be granted.

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7 DATED: February 29, 2008

Respectfully submitted,
WESTON & McELVAIN LLP



Richard C. Weston
Aaron C. Agness
Attorneys for Defendant
THE BURLINGTON INSURANCE
COMPANY (erroneously sued
as BURLINGTON INSURANCE
COMPANY)

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1 **PROOF OF SERVICE**

2 *Jenny Wolfes v. Burlington Insurance Company*
3 USDC, Northern District Case No.C07 00696

4 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

5 I am employed in the County of Los Angeles, State of California. I am over the age of 18
6 and not a party to the within action; my business address is 888 West Sixth Street, 15th Floor, Los
7 Angeles, California 90017.

8 On February 29, 2008, I served the foregoing document described as: **DEFENDANT**
9 **THE BURLINGTON INSURANCE COMPANY'S REPLY TO JENNY WOLFES'**
10 **OPPOSITION TO BURLINGTON'S MOTION TO DISMIS COMPLAINT AS**
11 **IMPROPERLY DUPLICATIVE** on all parties as indicated below:

12 *Gerald Emanuel*

13 *HINKLE, JACHIMOWICZ, POINTER & EMANUEL*

14 *2007 West Hedding Street, Suite 100*

15 *San Jose, CA 95128*

16 *Telephone: (408) 246-5500*

17 *Facsimile: (408) 246-1051*

18 [X] by placing the true copies thereof enclosed in sealed envelopes addressed as stated above.

19 [X] **BY MAIL** as follows: I am readily familiar with the firm's practice of collection and
20 processing correspondence for mailing. Under that practice it would be deposited with the U.S.
21 Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in
22 the ordinary course of business.

23 [] **BY FEDERAL EXPRESS:** I caused said envelope to be delivered to a courier
24 authorized by the express service carrier to receive documents, in an envelope or package
25 designated by the express service carrier with delivery fees paid or provided for, addressed to the
26 person to whom it is to be served, at the office address as last given by that person on any
27 document filed in the cause and served on the party making service.

28 **BY FACSIMILE** I sent such document from facsimile machine (213) 596-8039 on
29 February 29, 2008. I certify that said transmission was completed and that all pages were received
30 and that a report was generated by facsimile machine (213) 596-8039 which confirms said
31 transmission and receipt. I, thereafter, mailed a copy to the interested party(ies) in this action by
32 placing a true copy thereof enclosed in sealed envelope(s) addressed to the parties listed on the
33 attached service list.

34 [X] **(FEDERAL)** I declare that I am employed in the office of a member of the bar of this
35 Court at whose direction the service was made.

36 Executed on February 29, 2008, at Los Angeles, California

37 
38 SHARON POLK